In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. . . . . . .

LENORE S. ROBINETTE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals for the Sixth Circuit has not yet been officially reported. It will be found on pages 65-69 of the Record.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; United States Code, Title 28, Sec. 347. Tax cases in which transferees of property instead of original taxpayers are interested are reviewable in this Court on certiorari to a Circuit Court of Appeals. *Phillips v. Commissioner,* 283 U. S. 589.

2. The judgment of the Circuit Court of Appeals was entered on December 8, 1943. (R. 63.) A Petition for Rehearing, seasonably filed, was denied on January 24, 1944. (R. 71, 77.) Petitioner is allowed three months from the

latter date within which to file her Petition for Writ of Certiorari. Act of February 13, 1925, c. 229, Sec. 8 (a, b, d), 43 Stat. 940; United States Code, Title 28, Sec. 380; *Gypsy Oil Co. v. Escoe,* 275 U. S. 498.

STATEMENT OF THE CASE AND OF QUESTIONS INVOLVED.

The Petition for Writ of Certiorari contains a statement of the case and of the questions involved, as well as of all the facts material for consideration of the questions. *Supra,* p. 2. As in the Petition, Charles C. Cohn (later Cole) will hereinafter be referred to as the taxpayer.

The findings of fact and the opinion of the Board of Tax Appeals are reported in 46 B. T. A. 1138, and are copied on pages 31-40, 46-47 of the Record.

Relevant portions of some of the most important of the statutory provisions involved are printed in chronological order in the Appendix.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding and deciding that income tax was imposed at the rates prescribed by the Revenue Act of 1918 with respect to the incomes for that year of United States citizens who then resided in the Philippine Islands.

2. In holding and deciding that Respondent had power to administer provisions of the Revenue Act of 1918 with respect to the incomes for that year of United States citizens who then resided in the Philippine Islands.

3. In holding and deciding that the filing, with the Collector of Internal Revenue for the Philippine Islands, by a citizen of the United States who during the year 1918 resided in those Islands, of his income tax return of his income from all sources for that year, did not start the

running of the applicable statute of limitations against the assessment of an income tax deficiency for that year, and in holding that, notwithstanding every statutory limitation provision, the deficiency in controversy for that year is now assessable against the petitioner, as transferee of a transferee of property from the estate of such citizen.

4. In not holding and deciding that the question of liability for the income tax deficiency in controversy was closed, under *res adjudicata* or comparable doctrines, when the Respondent in appropriate proceedings determined Federal estate taxes due both from the estate of the first transferor, the taxpayer, Charles C. Cole, and from the estate of Creswell C. Cole, the transferee of property from the estate of said Charles C. Cole, without then asserting and proving and deducting from the gross estate of either of them, as determined in those proceedings, any amount representing an income tax deficiency of the taxpayer for the year 1918.

5. In holding and deciding that there can and should be assessed against the petitioner herein, as transferee of a transferee of property from the estate of the taxpayer, an amount, representing the asserted income tax deficiency of such taxpayer for the year 1918, and interest thereon, greater in the aggregate than the value of the assets, formerly owned by the estate of the taxpayer, which were shown by the Record to have been received by the petitioner.

ARGUMENT.

The reasons relied upon for allowance of the Writ, as such reasons are set forth in the Petition, can best be set forth with more and necessary detail in a discussion following the lines of the Specification of Errors, *supra*.

I.

The Revenue Act of 1918 did not impose an income tax at the rates prescribed therein, with respect to the incomes of United States citizens who during that year resided in the Philippine Islands, or require that such citizens file income tax returns for that year elsewhere than with the Collector of Internal Revenue at Manila.

The Respondent contends that both the Revenue Act of 1916 and the Revenue Act of 1918 imposed income taxes with respect to the net income for the year 1918 of individuals, citizens of the United States, who resided during that year in the Philippine Islands. The Respondent contends further that said two Acts required that each such individual file two returns for that year, the first with the Collector of Internal Revenue at Manila, showing thereon the amount of his income tax liability according to the rate and other provisions of the 1916 Act, and the second with the Collector at Baltimore, showing on the latter the amount of income tax resulting from application of the rate and other provisions of the 1918 Act, and that both returns were required to be of the individual's net income from all sources.

The petitioner contends that no income tax was imposed by the Revenue Act of 1918 with respect to the net income of such individual for that year, and that he was required only to file a single return for that year with, and to pay all of his income tax to, the Collector at Manila, computing his said tax in accordance with the provisions of and at the rates prescribed in the Revenue Act of 1916, which the Revenue Act of 1918 continued in effect for said year 1918 as to all residents of the Philippine Islands; and that said 1916 Act stated all of the income tax liability of such individual for the year 1918. There was no amendment of the 1916 Act, in 1917 or 1918, which changed the income tax rate provisions of said 1916 Act.

In Section 15 of the Revenue Act of 1916, the Philippines were declared to be within the "United States" and the income tax provided for by the Revenue Act of 1916 was imposed by Section 1(a) thereof upon each individual, a resident of the Philippines, upon the basis that he was a resident of the United States. But any income tax imposed upon such individual by the Revenue Act of 1918 must have been imposed solely upon the basis that he was a United States citizen since, as defined in Section 1 of the 1918 Act, the Philippines were geographically not within the United States, and such individual was, therefore, not a resident of the United States.

Section 261 of the Revenue Act of 1918 provided clearly, definitely and *specifically* that in the Philippine Islands *the income tax* should be levied, assessed, collected and paid in accordance with the provisions of the Revenue Act of 1916 as amended. Also that returns should be made and taxes paid under Title I, income tax provisions, of the 1916 Act in the Philippine Islands, by *every individual* who was a *resident* of those Islands.

By Section 1400 of the Revenue Act of 1918 certain parts of earlier Revenue Acts, including said Title I of the Revenue Act of 1916, were repealed. But all of said parts were so repealed "subject to the limitations provided in subdivision (b)" of said Section 1400, one of which was that "Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917" should remain in force for the assessment and collection of the income tax in the Philippine Islands, except as it might be otherwise provided by the legislature of those Islands.

To treat this provision for assessment and collection of tax in the Philippines otherwise than as a provision respecting prospective taxation must be, we submit, to leave it as a clause bare of any purpose whatever, since provision for making assessments and collections in all situations where the tax liability had already accrued had previously

been made in the first sentence of said Section 1400(b) reading: "Such parts of acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder," etc.

The power, granted to the Philippine legislature by said Sections 261 and 1400(b) of the Revenue Act of 1918, to amend the income tax provisions of the Revenue Act of 1916 so continued in effect in the Islands, was not exercised until March 7, 1919 when that legislature passed its Act No. 2833, certain sections of which are printed in the Appendix hereto, to take effect January 1, 1920.

A local income tax law was not among those laws which the legislature of the Philippine Islands was authorized to enact. Organic Act of August 29, 1916, 39 Stat. 548, Sec. 11. By Section 19 of that Act it could enact no law which the Congress could not annul.

By the Naval Appropriations Act of July 12, 1921, 42 Stat. 123, the Congress granted to the Virgin Islands the power to enact a local income tax law. It granted similar power to Porto Rico by the Act of March 4, 1927, 44 Stat. 1418, c. 503. But no such power was ever granted to the Philippine Islands.

The Congress having provided clearly and *specifically* by said Sections 261 and 1400(b) of the Revenue Act of 1918 for the filing by every individual, a resident of the Philippine Islands, of his income tax return for the year 1918 with, and, pursuant to such return, for payment by him of his income tax to the Collector at Manila (see Section 23, Revenue Act of 1916), upon the basis of his residence there, it is necessary that an equally or more clear and *specific* provision to the contrary be found elsewhere in the 1918 Act if it is to be held that such individual was required to file another return with, and to pay an additional tax for that year to the Collector at Baltimore, upon the basis of the individual's United States citizenship.

The Respondent's whole case in relation to this point stems from the use *generally* in Sections 210 and 211(a) of the Revenue Act of 1918 of the words "every individual," and from the *general* direction in Section 227(b) of that Act that non-residents of the United States file their returns with the Collector of Internal Revenue at Baltimore.

The Supreme Court has held that taxes are not imposed upon the basis of citizenship alone unless they are *clearly* so imposed. *United States vs. Goelet*, 232 U. S. 293. The statute which the Court interpreted in that case used the *general* words "any citizen" almost identically as the *general* words "every individual" were used in Sections 210 and 211(a) of the Revenue Act of 1918. The petitioner submits that to the said words "every individual" as used in those sections there should be given a construction in this case similar to that which was given to the words "any citizen" in the said *Goelet* case.

By the "in lieu thereof" provision in said Section 1400(b) of the Revenue Act of 1918, the Congress made it clear that it did not impose income tax under both the 1918 Act and the amended 1916 Act at the same time, in the Philippine Islands.

Cook v. Tait, 265 U. S. 47, is not an authority against the basic contention of the petitioner here since in that case, involving the Revenue Act of 1921, *Cook*, a citizen of the United States who resided permanently in Mexico, did not argue and the Court did not decide any question as to the intended application of the income tax provisions of that Act to his income derived from sources in Mexico. It was decided there only that Congress had power to tax such income. The later Revenue Acts, since 1927, make it clear that residence is the only basis for imposing the income tax. Until 1928, whenever the question was raised, the Court had to determine whether the Act showed that the Congress *clearly* intended taxing the income of the citi-

zen, non-resident of the United States, when his income was derived from sources outside the United States.

In *Cotterman v. United States,* 62 Ct. Cl. 415, in which this Court denied certiorari, the taxpayer's case was not adequately presented. The decision in that case may be said to have been rested entirely upon the credit provision in Section 222(a)(1) to which we shall hereinafter refer. The *Cook* case, *supra,* referred to by the Court of Claims in its opinion, did not decide the question involved in the *Cotterman* case.

In the present case Congress having provided *specifically* for the year 1918 for the filing of returns and the payment of taxes in Manila, pursuant to the 1916 Act, by all individuals including United States citizens who resided there, the rule of *expressio unius est exclusio alterius* is applicable. For this reason such individuals were not required by the *general* provisions of the 1918 Act to file returns and pay income taxes elsewhere than in Manila.

It is fundamental that the taxed class is never larger than the tax imposing section of the statute, strictly construed in the light of later definitely limiting sections of the statute, makes it. *United States v. Stroop,* 109 F. (2d) 891, 893.

The *general* provision in Section 227(b) of the 1918 Act, regarding the filing of returns with the Collector at Baltimore, by individuals, non-residents of the United States, did not require that residents of the Philippines, who by the rule in Section 1 of that Act were non-residents of the United States, file their returns in Baltimore, since Section 261 of that Act, which must be read with Sections 8(b) and 23 of the Revenue Act of 1916, *specifically* directed that they file their returns where they resided. This meant, as to the taxpayer in this case, in Manila.

The principal question whether tax was imposed by the 1918 Act upon residents of the Philippines, who were also citizens of the United States, is a question which must be

answered without reference to said Section 227(b). That Section may not be cited in support of an affirmative answer to the said principal question, since certainly the filing of returns in Baltimore was required only of those non-residents of the United States upon whom the tax was imposed. For the same reason said principal question must be answered without reference to Section 222 of the 1918 Act, containing provision for credit possibly allowable to such non-residents of the United States, and that Section also may not be cited in support of an affirmative answer to the said principal question. In 1918 Porto Rico and the Philippines were only two of eight island possessions of the United States. Said Section 222 was intended to apply only to the other six. The same must be said in answer to any contention by the Respondent as to the scope of application of said Section 222 based upon any change made in the final draft of said Section from the form in which it appeared first in the House Bill. See amendment recommended by the Conference Committee and referred to by the Circuit Court in its opinion in *Helvering v. Campbell*, *infra*.

During the entire period since the occupation of the Philippine Islands the Congress has not imposed any tax in the Philippine Islands upon products or residents thereof, for the benefit of the United States. 34 Op. Atty. Gen. 550, 553, October 17, 1925. Cf. Coconut Oil Processing Tax Act of May 10, 1934, 48 Stat. 763, as amended by Act of February 10, 1939, I. R. C. Section 2476.

The assumption which was the basis upon which *Lawrence v. Wardell*, 273 Fed. 405, was decided, viz. that Title I, income tax provisions, of the Revenue Act of 1916 was converted into a local law when the Philippine legislature by the 1917 and 1918 Acts was granted the power to amend said 1916 Act as applicable there, was clearly an erroneous assumption. Cf. *Asiatic Petroleum Co. v. Insular Collector of Customs*, 297 U. S. 666, 669, 670. The Court there

ruled upon the application as a local law of a similar provision in the Philippine Tariff Act of August 5, 1909, 36 Stat. 130, 176, Chap. 8. The decision in said *Lawrence* case had nothing except said erroneous assumption to support it. Whether after 1918, and the passage of Act 2833 by the Philippine legislature, effective after 1919, there was any change in the status of income taxpayers in the Philippines, is a question not presented for decision in the present case.

Until the recent Board of Tax Appeals cases arose, the *Lawrence* case had been cited only once, i.e. in *Neuss, Hesslein and Co., Inc. v. Edwards,* 24 F. (2d) 989. Even in that case it was not cited as an authority holding that United States citizens, who during the year 1918 resided in the Philippine Islands, were taxable at the rates prescribed by said 1918 Act. On the contrary, on page 991 of the opinion in that case, the Court said:

> "Undoubtedly Congress could have made the act of 1917 (40 Stat. 300) and 1918 (40 Stat. 1057) applicable to Porto Rico and the Philippine Islands, but evidently it did not desire to include them in the heavier taxes imposed upon American corporations which were necessitated by the expenses of carrying on the World War."

Judgment in that case was affirmed in 30 F. (2d) 620, C. C. A. 2. In that case it was held that no undue discrimination against domestic corporations resulted from the failure of Congress to tax under the 1918 Act the incomes of corporations organized under Philippine law, but which had transactions within the United States.

Section 261 of the Revenue Act of 1918 provided unqualifiedly for the application in the Philippine Islands of the income taxing provisions of the Revenue Act of 1916. The Organic Act of August 29, 1916, 39 Stat. 547, Section 5, had provided, and when the Revenue Act of 1918 was approved said Organic Act continued to provide, that later United States statutes should apply in the Philippine

Islands only when they contained specific provision for such application. The Revenue Act of 1918 contained no such specific provision for application of the taxing provision of that Act in the Philippine Islands. There was such required specific provision relating to Philippine application in Section 23 of the Revenue Act of 1916.

On December 2, 1933, the Attorney General of the United States, in 37 Op. Atty. Gen. 360, 363, advised that the provisions of the National Industrial Recovery Act, 48 Stat. 211, June 16, 1933, which were not made expressly applicable in the Philippine Islands, were not applicable there, and cited said Section 5 of said Organic Act as requiring that conclusion. He had held to the same effect in former opinions. Cf. 34 Op. Atty. Gen. 550, 553, dated October 17, 1925.

The clause in Section 5, Title I, War Income Tax, Revenue Act of 1917, expressly making that Act not applicable in the Philippine Islands, was unnecessary. Without the enactment of that clause that Act would have been inapplicable there by virtue of the provision in said Section 5 of said Organic Act.

There is no implication that Sections 210 and 211(a) of the 1918 Act were intended to impose tax upon the incomes of United States citizens who during 1918 resided in the Philippines because Section 260 of the Revenue Act of 1918 provided that an individual who was a citizen of a possession, but not otherwise a citizen of the United States and who was not a resident of the United States, should be subject to tax under that Act only on income from sources within the United States. Said Section must be read with the immediately following and complementing Section 261, which provided *specifically* where every individual who resided in the Philippine Islands should file his return and pay his tax.

Section 262 of the Revenue Act of 1921 clearly implies that United States citizens who resided in the Philippine

Islands in 1918 were not subject to tax under the 1918 Act. That Section provided, as to any domestic corporation, or any United States citizen regardless of the place of his residence, if it or he derived 80 per cent or more of its or his income from sources within a possession, and 50 per cent or more of its or his income from the active conduct of a business within a possession for a period of three years, that it or he could treat all income from the possession, in so far as the 1921 Act was concerned, as entirely tax free. If the conditions were met, the Section applied to income derived from sources within any United States possession except the Virgin Islands. This of course meant Porto Rico, the Philippines, Panama Canal Zone, Guam, Tutuila, Wake and Palmyra. Said Section 262 was not designed and enacted especially for the benefit of United States citizens who resided in the Philippines since it did not refer specifically to either that possession or such residents of it. Clearly those who stood to benefit largely from enactment of said section were domestic corporations, in a situation like that of the appellant in *Neuss, Hesslein & Co. v. Edwards, supra,* and citizens who resided in the United States and were engaged in trade or business in one or more of said possessions, but who retained domicil in the United States.

How the Respondent interpreted the applicability of the Revenue Acts of 1916 and 1918 in relation to the Philippine Islands, on April 17, 1919 when he promulgated his Regulations 45, is indicated by the following which is quoted from Article 1131 of his said Regulations:

> "In Porto Rico and the Philippine Islands the Revenue Act of 1916, as amended, is in force and the Revenue Act of 1918 is not. See also Section 1400 of the statute."

It is only since about the year 1938 that Respondent has attempted to administer the provisions of the Revenue Act of 1918 in the Philippines.

In Article 1132 of his said Regulations, after stating a different rule as to the applicability of the said two Acts in Porto Rico, the Respondent said that "the same principles apply in the case of the Philippine Islands." But in said Article 1132 he referred only to Section 222 of the statute as supporting that conclusion. We have shown, *supra*, p. 15, that when an affirmative answer is being sought to the principal question in dispute, viz. whether tax was imposed by the 1918 Act upon residents of the Philippines who were also citizens of the United States, there is a clear begging of the question when the provisions of said Section 222, relating to the credit possibly allowable to such individuals as non-residents of the United States, is cited as supporting such affirmative answer.

The scope of a statute cannot be enlarged by regulation. A regulation which goes beyond the statute is void. *Iselin v. United States*, 270 U. S. 243, 250; *Janney v. Commissioner*, 108 F. (2d) 564, 567, C. C. A. 3.

A doubtful tax does not exist. *Pennsylvania Co. v. McClain*, 107 Fed. 367, 370.

In the opinion by the Circuit Court of Appeals in its dealing with the matter involved under this Point I, one of its most obvious errors was in considering the *general* words "every individual" used in Sections 210 and 211(a) of the 1918 Act as controlling, and in not giving effect to other contrary, *specific* provisions of Sections 261 and 1400 of that Act to which we have referred, which clearly indicated that application for that year of the tax rates prescribed by that Act to incomes of residents of the Philippine Islands and Porto Rico was not intended. This matter was emphasized below especially but not solely in the Petition for Rehearing. (R. 74, 75.) *Specific* provisions have always been recognized under our law as controlling over inconsistent *general* provisions, in construing and applying any statute. *Kepner v. United States*, 195 U. S. 100, 125; *Helvering v. New York Trust Co.*, 292 U. S. 455, 464. When

the Congress went to the length to which it did go in enacting said *specific* provisions it intended them to be given effect. By the erroneous decision of the Circuit Court in this important respect it so far departed from or sanctioned departure by a lower Court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The petitioner therefore respectfully submits that the tax rate provisions of the Revenue Act of 1918 were not intended to apply and did not apply in the Philippine Islands. See especially on principle, the *Goelet* case, *supra*; also the *Asiatic Petroleum Co.* and *Neuss, Hesslein & Co., Inc.* cases, *supra*. The Board of Tax Appeals reasoned soundly as to the income tax in controversy before it in the instant case for the year 1917. As to the tax for the year 1918 it was misled by the erroneous decision in the *Lawrence* case, *supra*.

II.

The authority to administer the income tax law for the year 1918 in the Philippine Islands was vested solely in the internal revenue officers there.

By Section 261 of the Revenue Act of 1918 there was continued in effect in the Philippines the provision of Section 23 of the Revenue Act of 1916, that the administration of the law and collection of the income tax imposed in the Philippine Islands should be by the appropriate internal revenue officers of the government there; also the provision of said Section 23 vesting jurisdiction of income tax controversies concerning the tax of residents in the courts of the Islands. See also Section 1400(b) of the Revenue Act of 1918. The authority so *specifically* granted to said internal revenue officers of the Philippine Islands, under the well accepted rule of construction, should be held to be controlling notwithstanding any such authority granted to the Respondent elsewhere *generally* in the statutes. Cf.

Kepner v. United States and *Helvering v. New York Trust Co., supra.*

In other comparable situations, when the Congress has desired to have the Respondent take part in the determination and collection of tax in a possession, it has specifically authorized and directed him to do so. See as instances:

In Porto Rico:

Act of April 12, 1900, c. 191, Sec. 3, 31 Stat. 77;
Act of June 29, 1906, c. 3613, 34 Stat. 620;
Act of March 4, 1927, c. 503, Sec. 3, 44 Stat. 1418.

In Virgin Islands:

Act of May 26, 1936, c. 450, Sec. 3, 49 Stat. 1372; also c. 699, Sec. 36, page 1816.

The provision in said Section 23 of the Revenue Act of 1916 for the administration of the law and collection of the tax imposed in the Philippine Islands by the appropriate internal revenue officers there was similar to that in such other Acts of the Congress as the following:

Customs Act of March 8, 1902, 32 Stat. 54;
Navigation Laws of April 29, 1908, c. 152, Sec. 5, 35 Stat. 70;
Narcotics Act of December 17, 1914, 38 Stat. 785, 787, Sec. 2(d);
Act of August 29, 1916, 39 Stat. 548;
Immigration Act of February 5, 1917, 39 Stat. 874;
Customs Duties for Virgin Islands, Act of March 3, 1917, 39 Stat. 1133;
National Defense Act of June 15, 1917, 40 Stat. 217, 231;
Trading with the Enemy Act of October 6, 1917, 40 Stat. 411, 425;
Act of June 17, 1930, c. 497, Sec. 301; 46 Stat. 686.

The 1918 Act would not have been constructed as it was if the intention of the Congress had been to allocate a

total tax, part to expenses of the government of the Philippine Islands and part to expenses of the home government of the United States. Instead, that Act would have been made to provide, as it very simply could have been, for the payment of all tax in the Philippine Islands and for transmitting part thereof to the United States, conversely as e.g. custom duties have long been authorized to be collected in the United States and the funds set apart for the Philippines. Section 24 of the Organic Act, *supra*, provided for the continuous or periodical balancing and settling of accounts between the two governments. Cf. Act of May 10, 1934, 48 Stat. 763, as amended by Act of February 10, 1939, I. R. C. Sec. 2476.

III.

The assessment of the deficiency in controversy was barred many years ago by a statute of limitations.

The taxpayer, the original transferor in this case, who resided in 1918 in the Philippine Islands, filed his income tax return for that year with the Collector of Internal Revenue at Manila on February 20, 1919 (R. 21, 33), as required by Section 261 of the Revenue Act of 1918 and Section 8(b) of the Revenue Act of 1916. His said return was on the approved printed income tax form known as No. 1040, designed and supplied to him by the government for his use. (Petitioner's Exhibit 2, R. 77.) It showed on its face that it was a return for the calendar year 1918. In answer to the question on the return concerning citizenship there was written the word, "American." On the face of said return, also in the printed form of verification thereof which the taxpayer executed, reference was made to the Act of Congress "approved September 8, 1916, as amended by Act of October 3, 1917." This met the requirement in Section 261 of the 1918 Act. In the similar printed form of return supplied to the taxpayer for 1917 (Peti-

tioner's Exhibit 1, R. 77), there were not used the said words "as amended by Act of October 3, 1917" which were used in said 1918 form.

The said 1918 return having been so filed, the applicable statute of limitations barred the assessment and collection of the deficiency in controversy herein five years after said February 20, 1919. This is so if the applicable statutory provision was that of either Section 250(d) of the Revenue Act of 1918, or Section 250(d) of the Revenue Act of 1921. If the time allowed for making the assessment was three years, as prescribed by Section 9(a) of the Revenue Act of 1916, or Section 9(a) of Act 2833 of the Philippine legislature, the final date for making the assessment was February 20, 1922. Section 261 of the Revenue Act of 1921 provided that in the Philippine Islands the income tax should "be levied, assessed, collected and paid as provided by law prior to the passage of this Act."

This is not a case in which the taxpayer filed no return. Cf. *Germantown Trust Co. v. Commissioner*, 309 U. S. 304, 307, 309, 310; *Marshall's Heirs v. Commissioner*, 111 F. (2d) 935, C. C. A. 3; *Florsheim Bros. Dry Goods Co., Ltd. v. United States*, 280 U. S. 453, 462; *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 180; *Balkan National Insurance Co. v. Commissioner*, 101 F. (2d) 75, 78, C. C. A. 2; *Stearns Co. v. United States*, 291 U. S. 54, 62; 5 *Paul & Mertens Federal Income Taxation*, Par. 50.12. The taxpayer in the instant case filed a return of his income from all sources, not a tentative but a complete return, and he intended it to be made the basis for an assessment.

The case of *Helmuth Heyl*, 34 B. T. A. 233, which was cited by the Board (R. 36), is not in point since there no return was filed. *Eli Kirk Price*, 23 B. T. A. 1192 (R. 36), may not be considered an authority since the decision in *Germantown Trust Co. v. Commissioner, supra.* In *Emil Peterson*, 45 B. T. A. 624 (R. 36), only a small deficiency was involved, for the year 1918. A petition for review

of that decision was erroneously filed with the Court for the Ninth Circuit and there dismissed on Respondent's motion, for irregularities in procedure.

When the making of an assessment against a taxpayer has been barred during the taxpayer's lifetime, his liability may not be assessed against any transferee of property from him at or after his death. *Kentucky Oil Corporation*, 21 B. T. A. 1150, 1163, appeal dismissed 59 F. (2d) 1055, C. C. A. 6.

By not specifying, in Section 280(a) of the Revenue Act of 1926, any period of limitation for assessment of any liability of the taxpayer for tax under the Revenue Act of 1926, and Revenue Acts prior thereto, against a transferee *of a transferee* of property from the taxpayer, as was done later, but not for the prior years, by Section 311(b) of the Revenue Act of 1928, the Congress is shown to have intended the assessment of the taxpayer's liability, if any, for the year 1918 only against the initial transferee of property from the taxpayer.

Where the transferor's liability was barred by limitation before the enactment of Section 280(b)(1) of the Revenue Act of 1926, Congress did not intend thereby to reopen cases definitely closed. Sec. 278(e), Revenue Acts of 1924 and 1926.

The Collector of Internal Revenue at Baltimore was specifically informed by letter sent by the taxpayer in August, 1923, to said Collector concerning his income tax return for the year 1918 (R. 28).

The Circuit Court of Appeals for the Fourth Circuit in its opinion in *Helvering v. Campbell*, —F. (2d)—, January 10, 1944, in dealing with the matters which we have discussed so far in our argument herein, committed precisely the same errors which we have specified as committed by the Circuit Court in the instant case. No tax under the 1918 Act was involved in the companion case of *Helvering v. Nell*, which that Court then decided.

IV.

Respondent must be said to have twice heretofore determined in appropriate proceedings that there was no liability for the particular deficiency in controversy herein.

Since the Respondent, both in 1932, in proceedings for determination of the net value of the Charles C. Cole estate subject to Federal estate tax, and again in 1936 in similar proceedings in the Creswell C. Cole estate, did not assert and prove the amount of the deficiency in controversy herein as a liability of either of said estates, and did not allow the amount of said deficiency as a deduction in determining the amount due as such Federal estate tax from either of said estates, the Respondent may not now assess and collect said deficiency and interest thereon, or either of them, against or from the petitioner in this proceeding against her as transferee of a transferee. Based upon said two prior determinations it should be held that the question concerning the deficiency involved herein was closed years ago, under *res adjudicata* or other comparable doctrines.

V.

Petitioner is not now liable as transferee for payment of interest, as held by the Board and the Circuit Court in this case, with respect to any deficiency of the taxpayer, and can incur an interest liability only by withholding payment of the deficiency after and if the decision of the Board of Tax Appeals sustaining the Respondent's determination becomes final. Her maximum interest liability, if any, will be that amount which, when added to the deficiency, will equal the value of the assets shown to have been received by her as transferee.

There is at most only a secondary liability of the petitioner as transferee for payment of the deficiency in controversy. *Oswego Falls Corp.*, 26 B. T. A. 60, affirmed 71 F. (2d) 673. Until the order of the Board of Tax Appeals

herein has been further affirmed, or become final, the primary liability of the taxpayer-transferor for payment of the deficiency will not have been established. The interest from July 1, 1939 which the Respondent would now assess against petitioner as transferee is not a carry over of interest for which the taxpayer-transferor could have been held liable at the time of his death in 1931. Any such item of interest was made uncollectible by the provision in Section 813(a) of the Revenue Act of 1938. That was purely a relief section. No implication arises from its enactment that income tax was intended to be imposed by the 1918 Act upon United States citizens who resided during that year in the Philippine Islands. To obtain the benefit of the relief provided by that section nothing was required of the taxpayer except residence in a possession for more than six months during the taxable year. The same benefit was extended to members of another group whose qualifications were outlined at greater length in that section. It did not impose interest from July 1, 1939, with respect to any deficiency of any taxpayer or transferee. Nor did Section 280(a)(1) of the Revenue Act of 1926 provide for payment by a transferee of any interest except that for the payment of which the transferor was liable as of the time of the transfer. Cf. *Koppers Company v. Commissioner*, 3 T. C.—, No. 7, January 19, 1944, C. C. H. Tax Court Service, Decision 13,687. See also Petitioner's Exceptions (R. 44). No such interest liability of the taxpayer as of that time has ever been conceded or established. The amount of interest, therefore, for payment of which petitioner may become secondarily liable, is only such amount as may accrue against her if she withholds payment of the deficiency after the taxpayer's deficiency liability, if any, may be established by final order in this proceeding.

In its Memorandum *Sur* Decision (R. 47) the Board cited Section 311 of the Revenue Acts of 1932, 1936 and 1938, none of which is applicable to the year now involved.

Section 912 of the Revenue Act of 1924 (enacted as an amendment by Section 602 of the Revenue Act of 1928) did not change the burden of proof rule which the courts have always followed, namely, that he who tries to hold a transferee of property liable for the debt of another must prove that the transferee has come into possession of property of the other of sufficient value to make it possible for him to pay such debt. When the petitioner agreed in the stipulation (R. 24) that she received assets of a value in excess of $30,712.22, no *prima facie* case was established for Respondent that petitioner had received assets of the value of that amount plus interest thereon at some rate not fixed, and for some indefinite period of time after July 1, 1939.

The well recognized rule of evidence applicable in this situation is discussed in such cases as *Kelly v. Jackson*, 6 Peters 622, 629, and *Bailey v. Alabama*, 219 U. S. 219, 234. The cases cited by the Circuit Court in this connection (R. 69) are not in point. Respondent in paragraph 12 of his answer (R. 14) alleged affirmatively that the transferor, Creswell C. Cole, had received from the estate of his deceased father, the transferor, Charles C. Cole, property worth much more than $30,812.22, or the total of the then asserted deficiencies. But this allegation was denied by petitioner in paragraph 12 of her reply (R. 17). A transferee may be held liable to the extent of the value of assets received. *Phillips v. Commissioner*, 283 U. S. 589, 603. The Respondent, who had the burden of proving such extent, proved only $30,712.22 as such value. There was not then shifted to the petitioner the additional burden of proceeding to show exactly how much or little the transferred property was worth on each of the several transfer and distribution dates. That burden remained with the Respondent upon whom general provisions of the law placed it.

CONCLUSION.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

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